DATE: January 15, 1999

CASE NO: 1998-INA-41

In the Matter of

ALBERTO'S MEXICAN RESTAURANT
Employer

on behalf of

JOSE D. JAUREQUI-QUINTERO
Alien

Appearances: Susan Jeannette, Agent
For Employer

Certifying Officer:
Rebecca Marsh Day,
Region IX

Before: Holmes, Jarvis, and Vittone
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Alberto's Mexican Restaurant's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the

Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On May 5, 1995, the Employer filed a Form ETA 750 Application for Alien Employment Certification with the California Employment Development Department ("EDD") on behalf of the Alien, Jose D. Jauregui-Quintero. (AF 227). The job opportunity was listed as "Cook" The job duties were described as follows:

> Preparation of full range of Mexican menu items, such as carnitas, carne asada, machaca, burritos, tacos, tostadas, tamales, beans, rice, salsa, and guacamole. Use and knowledge of standard restaurant equipment, utensils and appliances. The rotating shift is because the restaurant is open 24 hours per day, and this gives everyone a chance for evenings and weekends of[f] as per rotation. Must speak Spanish, as the owner is a newly legalized immigrant from Mexico to U.S. and he speaks and understands only Spanish... all employees are Mexican, speaking and understanding only Spanish and safety instructions and directions must be understood, especially under the pressure of busy times.

(Id.). The stated job requirements for the position, as set forth on the application, included 6 years of grade school and 2 years experience in the job offered. Special requirements included the ability to pass county health regulations for food-workers. The rate of pay was listed as $8.00 per hour. (Id.).

EDD forwarded the resume of 1 U.S. applicant to the Employer. (AF 226). The Employer's Results of Recruitment Report indicated that the U.S. applicant was not hired. (AF 237). The file was transmitted to the CO. (AF 226).

The CO issued a Notice of Findings ("NOF") on September 10, 1996, proposing to deny the certification for four reasons. (AF 218-225). First, the CO found that there is not a current job opening in violation of Section 656.20(c)(4). The CO questioned whether the Employer has the ability to pay the Alien the prevailing wage. (AF 219-220). Second, the CO found that the Employer failed to state the actual minimum requirements for the job opportunity in violation of Section 656.21(b)(5). The CO found that the Alien gained the required experience with the Employer. (AF 220-221). Third, the CO found that unlawful terms and conditions of employment exist in violation of Section 656.2(c)(7). (AF 222). Fourth, the CO found that the job opportunity was not open to U.S. workers in violation of Section 656.20(c)(8). The CO found that the Employer has been paying the Alien below the prevailing wage, and the Alien may be related to an owner or officer of the company. (AF 222-223). The CO found that:

> If the alien is working without wages and/or with payment below the offered amount, it is not apparent that the employer would replace the alien with any qualified U.S. worker.
>
> If the alien is related to someone who has [an] ownership interest, it would appear that the alien will ultimately exercise a determining influence in assessing the qualifications of any U.S. worker who might apply. This is contrary to 20 CFR 656.20(c)(8).

(AF 222). The CO requested that the Employer document the wages paid to the Alien. The CO also requested that the Employer document whether the Alien is related to any owner or officer of any Alberto's Restaurant. In addition, the Employer was to provide its Articles of Incorporation. (Id.).

The Employer submitted its rebuttal dated September 19, 1996, which provided the following information. (AF 46-217). Maria Sanjuana Rodriguez owns a number of Alberto's Mexican Restaurants in Southern California.[1] (AF 47). The Alien will work at the University Ave. Restaurant in San Diego. (AF 227). The job opportunity is for the night shift. M. Jones is the current cook on the night shift. The Employer would like to promote Jones to store manager and have the Alien take over the cooking duties. (AF 48). The Employer argues that she has sufficient wages to pay the Alien. The restaurant grossed $519,480 and paid out $124,895 for labor in 1995.[2] (Id.). The Alien obtained the required job experience while working at Aliberto's Restaurant, which is not owned by the Employer. (AF 49). The Alien has been on the Employer's payroll up until the fourth quarter of 1995. (AF 50). The Employer argues that the Alien is not related to her, her husband, nor her brothers. (AF 50-51).

---

[1]While she did not specify the exact number of restaurants, her tax returns indicate that her husband, Javier Colunga, owns 7 Alberto's Restaurants. (AF 157-170).

[2]The Employer submitted a large volume of financial documents including her EDD DE 6 Quarterly Wage Reports, U.S. Individual Income Tax Return, and Schedule C Profit/Loss statements for each restaurant. (AF 55-73, 78-97, 153-205).

Included with the rebuttal was an Affidavit of Prejudice and a Motion for Fair Adjudicating submitted by the Employer's agent. (AF 52-54). The Employer alleges that the Certifying Officers are biased and prejudiced against the Employer's applications. (AF 53).

On October 31, 1996, the CO issued an order stating that the NOF became the final decision of the Secretary of Labor because the Employer failed to rebut the NOF within 35 days.[3] (AF 217).

On April 16, 1997, the CO issued a Final Determination ("FD") denying certification. (AF 43-45). The CO found that the job opportunity was not open to U.S. workers. The CO found that the Alien might be related to the owner or an officer of the company. The CO also found that the Employer has been paying the Alien below the prevailing wage. (AF 44-45).

The Employer filed a Request for Review and Reconsideration dated April 25, 1997. (AF 2-42). The Employer argues that the Alien is not related to any owner or officer of the corporation. The Employer inadvertently failed to submit the Articles of Incorporation with its rebuttal. (AF 3). The Employer also argues that the CO is biased towards their applications in general and routinely fails to include all relevant documents in the Appeal File. (AF 4-5).

The CO denied the Motion for Reconsideration and forwarded the file to the Board for review. (AF 1).

Discussion

As an initial matter, we note that the Employer suggests that the CO is biased and prejudiced against the Employer, and that the CO routinely fails to include all relevant documents in the Appeal File. The Employer has filed numerous labor certification applications which have been denied. *See, e.g., Alberto's Mexican Restaurant*, 97-INA- 116 (Aug. 28, 1997); *Alberto's Mexican Restaurant*, 96-INA-386 (Aug. 28, 1997); *Alberto's Mexican Restaurant*, 96-INA-388 (Aug. 29, 1997); *Alberto's Mexican Restaurant*, 95-INA-256 (Aug. 29, 1997); *Alberto's Mexican Restaurant*, 97-INA-101 (Aug. 29, 1997); *Alberto's Mexican Restaurant*, 95-INA-240 (Sept. 5, 1997). The Employer makes numerous references of its dissatisfaction towards the labor certification process.[4] (AF 3-5, 47-51).

---

[3]Since the CO later reviewed the Employer's rebuttal and issued a Final Determination on the merits of the case, it appears that the CO implicitly vacated her October 31, 1996 findings.

[4]For example, the Employer states: "We have filed an "Affidavit of Prejudice", but "JS" continues to de-certify our cases. We want this looked into, exposed and regulated. This is highly unethical, fraudulent and illegal. This is not a communist country. This is America." (Letter from Sanjuana Rodriguez dated May 28, 1997).

We remind the Employer that each case is resolved on its individual merit. The Employer's quibbles cloud the relevant legal issues. We lack jurisdiction regarding the manner in which the Certifying Officers process the applications. The Employer should contact the Employment and Training Administration at the Department of Labor regarding any administrative concerns.

Regarding the material to be included in the Appeal File, we refer the Employer to Section 656.26(c)(1). The Employer may also review the entire Appeal File at the CO's office, and may suggest additional information to be included in the file. Section 656.26(c)(6). While the Employer did suggest that Appeal Files in past cases were incomplete, she did not specify whether there were any documents missing from the Appeal File in this case. Since the Appeal File here appears to be complete, we will move on to the substantive merits of the case.

The CO denied certification because the Employer failed to establish that there is a bona fide job opportunity available to U.S. workers.

Section 656.20(c)(8) requires that: "The job opportunity has been and is clearly open to any qualified U.S. worker. In *Amger Corp.*, 87-INA-545 (Oct. 15, 1987) (*en banc*), the Board held that the employer has the burden of establishing that a bona fide job opportunity is available to domestic workers, and that the Employer has, in good faith, sought to fill the position with a U.S. worker. Certification has been denied on the ground that no bona fide job opportunity existed where no current job opening existed for the position (*See Harvey Studios*, 88-INA-430 (Oct. 25, 1989)), where the alien has control or influence over the Employer (*See Young Seal of America, Inc.*, 88-INA-121 (May 17, 1989) (*en banc*); *Library & Business International, Inc.*, 93-INA-251 (Apr. 19, 1994)), or where the employer lacks the ability to pay the Alien the prevailing wage (*Fred's Allaf Jewelers*, 94-INA-620 (Aug. 15, 1996)).

The CO found that the Employer failed to establish that the Alien is not related to any of the owners or officers of the Alberto's Restaurants. (AF 44). In order to ascertain whether the Alien is related to any of the owners or officers, we need to examine the ownership structure of the restaurants.

Maria Sanjuana Rodriguez states that she is the owner of the Alberto's Restaurant on University Ave. in San Diego where the Alien will work. (AF 47). She submitted a copy of her business license. (AF 101). The Schedule C tax records indicate that Ms. Rodriguez's husband, Javier Colunga, owns 7 Alberto's Restaurants including the University Ave. location.[5] (AF 157-170). There appears to be at least 2 corporations involved in the ownership of the Alberto's Restaurants. Some of the EDD DE 6 Wage Reports are for the Molcarla Corporation. (AF 65-89). These wage reports do not list the individual restaurants. (AF 47). The Officers of the Molcarla Corporation are Sanjuana Rodriguez, President; Francisco Rodriguez, Vice President and Chief Financial Officer; and Patricia Rubio, Secretary. (AF 112-113). Ms. Rodriguez also refers to the formation of a new parent company, Alberto's Molca Salsa. (AF 48). The officers of the Molca Salsa Corporation are

[5]These records do not list Sanjuana Rodriguez as an owner.

Francisco Rodriguez, President and Chief Financial Officer; and Sanjuana Rodriguez, Vice President and Secretary. (AF 114-115). Juan Diego Rodriguez, Sanjuana Rodriguez's brother, is the founder of the Alberto's Restaurant chain.

At best, the ownership of the various Alberto's Restaurants is confusing. It appears that Sanjuana Rodriguez and her husband own 7 Alberto's Restaurants presumably under the Molcarla Corporation. It is not clear which restaurants are owned by the Molca Salsa Corporation.

The CO found that the Employer's rebuttal was unresponsive. Specifically, the Employer failed to provide copies of its Articles of Incorporation and failed to address whether the Alien was related to any officer of the corporation. (AF 44-45). We agree with the CO's findings and reasoning. Sanjuana Rodriguez states that the Alien is not related to herself, her husband or any of her brothers. The Employer failed to address whether the Alien is related to Patricia Rubio, an officer of the Molca Salsa Corporation.[6] Failure to address an NOF finding is grounds for denying certification. *See, Belha Corp.*, 88-INA-24 (May 5, 1989) (*en banc*); *Tarna of California*, 88-INA-478 (June 6, 1989). The Employer admits that it failed to provide the Articles of Incorporation as requested by the CO. The CO's request was reasonably related to the ownership of the company and the Alien's influence and control over the Employer. An employer's failure to produce a reasonably requested document is grounds for denying certification. *STLO Corporation*, 90-INA-7 (Sept. 9, 1991); *Oconee Center Mental Retardation Services*, 88-INA-40 (July 5, 1988).

In sum, we find that the Employer failed to establish that the job opportunity is open to U.S. workers. The Employer failed to adequately respond to the NOF.[7]

Order

The Certifying Officer's denial of labor certification is **AFFIRMED**.

For the Panel:

_____

DONALD B. JARVIS

[6]The CO also found that the Employer failed to address whether the Alien was related to Francisco Rodriguez. (AF 44). However, it appears that Francisco Rodriguez is the Employer's brother, and the Employer did state that the Alien was not related to any of her brothers. (AF 51).

[7]Since we find that the Employer failed to rebut that the Alien is related to an officer or owner of the corporation, it is not necessary to address whether the Employer was paying the Alien at a rate below the prevailing wage.

Administrative Law Judge

San Francisco, California